

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 22 August 2005

BALCA Case No.: 2004-INA-270
ETA Case No.: P2002-PA-03378739

In the Matter of

**DENNIS RESTAURANT,
T/A DREW'S FAMILY,**
Employer

on behalf of

ABDUL RAHIM,
Alien.

Appearance: Marina Zaharatos, Esquire
New York, New York
For the Employer and the Alien

Certifying Officer: Stephen W. Stefanko
Philadelphia, Pennsylvania

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Abdul Rahim ("Alien") filed by Dennis Restaurant, t/a Drew's Family ("Employer") pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, Philadelphia, Pennsylvania, denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26. The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in

the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On April 23, 2001, the Employer filed an application for labor certification to enable the Alien to fill the position of "Specialty Chef," which was classified by the Job Service as "Chef" (AF 29). The job duties for the position, as stated on the application, were:

He supervises, coordinates, and participates preparing and cooking foods in the restaurant. He selects and develops recipes based on type of food to be prepared and applying personal knowledge and experience in food preparation. He also supervises personnel engaged in preparing, cooking, and serving meats, sauces, vegetables, soups, and other foods. Cuts, trims, and bones meats and poultry for cooking. May employ, train and discharge workers. May be designated according to cuisine specialty as Chef, Greek.

(AF 29). The stated experience requirement for the position was six years in the job offered. (AF 29).

In a Notice of Findings ("NOF") issued on June 12, 2003, the CO proposed to deny certification on the grounds that the Employer had rejected two qualified U.S. applicants (David Mark Rush, Derek McKee) for other than lawful, job-related reasons. (AF 24-26). The Employer submitted its rebuttal on or about August 14, 2003. (AF 5-23). The CO found the rebuttal unpersuasive and issued a Final Determination, dated October 3, 2003, denying certification. (AF 3-4). On November 4, 2003, the Employer filed a Request for Review of the Denial of Certification. (AF 1-2). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals. Following the issuance of a "Notice of Docketing and Order Requiring Statement of Position or Legal Brief," dated June 24, 2003, the Employer's Owner, Jerry Countouris, filed a statement in support of its appeal.

DISCUSSION

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. §656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. §656.20(c)(8). Therefore, in general, an applicant who meets the stated job requirements is qualified for the job in terms of his or her education, training and experience; and, an employer's rejection of such qualified U.S. applicant is deemed unlawful. *See, e.g., United Parcel Service*, 1990-INA-90 (Mar. 28, 1991); *American Café*, 1990-INA-26 (Jan. 24, 1991); *Richco Management*, 1988-INA-509 (Nov. 29, 1989). On the other hand, where the employer's stated job requirements are not found to be unduly restrictive, an applicant who does not satisfy these requirements is not qualified. *See, e.g., Adry-Mart, Inc.*, 1988-INA-243 (Feb. 1, 1989)(*en banc*); *New Consumer Products*, 1987-INA-706 (Oct. 18, 1988)(*en banc*); *Concurrent Computer Corp.*, 1988-INA-76 (Aug. 19, 1988)(*en banc*).

In the NOF, the CO stated, in pertinent part:

According to your Results of Recruitment Report dated May 1, 2003, David Rush's experience was "*not the rank and level of expertise*" required for the position of Chef at your establishment. Similarly, Derek McKee's qualifications and work history "*do not demonstrate significant relevance to the position offered.*"

David Rush has over ten years of experience as a Cook. He has served as a Line Chef, Chef, and Sous Chef. Derek McKee also has extensive experience as a Cook. Based on their experience, it is clear that these applicants meet the minimum requirements for the Cook position.

Your recruitment report further indicates that the candidates' experience, or lack thereof, did not warrant an interview. This response is not accepted. Where an applicant's resume indicates that s/he meets the minimum job requirements or shows a degree of experience, education and training that likely qualify the applicant for the position, the employer bears the burden of further investigating the applicant's credentials.

You indicate that neither candidate shows any expertise in Greek cuisine. However, the menu you provided does not contain any Greek Specialty dishes. In fact, most of the items contained in your item, are standard fare

in American cuisine. Given the applicants' extensive cooking experience, it is very likely that they would be able to perform the job duties as a Chef in your restaurant.

Where the applicants admittedly meet the minimum requirements for a Chef, you may [not] reject them for not knowing the particular food styles without an objective detailed basis for your conclusion. The burden of proof is on the employer to show that U.S. workers are not able, willing, qualified or available for this job opportunity. Failure to provide lawful job-related reasons for rejection of otherwise qualified U.S. workers is a violation of Federal regulations.

(AF 17-18).

The Employer's rebuttal, in pertinent part, consists of a letter dated August 14, 2003 (AF 5-6), a copy of the Employer's menu (AF 8-14), and a proposed "Greek Menu." (AF 7).

We observe that the CO correctly found that the Employer's existing menu contains very few Greek dishes and is essentially an American menu with one or two Greek dishes, such as Greek Salad and Broiled Scrod Belavista. On rebuttal, the Employer contended that it is seeking to expand its increasingly Greek or Greek-American clientele. Accordingly, the Employer asserted that its prospective new menu will include various new Greek specialty dishes and pastries. In summary, the Employer stated:

Your conclusion, therefore, that the applicants David Mark Rush and Derek McKee had extensive cooking experience to perform the job duties of chef at our restaurant is irrelevant to the nature and purpose of our advertisement seeking to fill the new position of Greek specialty chef at the restaurant.¹ We do not require anyone new to cook the existing items on our menu. We are looking for someone who is an expert in Greek cuisine. If the applicant can also speak Greek, that is also a consideration in his favor. Because none of the applicants showed any skill or expertise

¹ The advertisement and job posting clearly specify that the job opportunity is for a "Specialty Chef, Greek Cuisine" at a restaurant, who has six years experience (AF 62-63). On the other hand, the ETA 750A form is somewhat ambiguous regarding the true nature of the position. As stated above, the duties appear to apply, generally, to all types of cuisine. However, Employer also noted: "May be designated according to cuisine specialty as Chef, Greek." (AF 29, Item 13).

in Greek cuisine, they were not qualified to be called for an interview.

In view of the foregoing there were lawful job-related reasons for rejection of the US applicants for the position advertised for our restaurant.

(AF 5-6).

In the Final Determination, the CO found the Employer's rebuttal to be unpersuasive. The CO reiterated that the Employer's current menu establishes that its business is primarily an "American cuisine restaurant." Furthermore, the CO noted that the resumes of the U.S. applicants indicate that they have experience in some of the job duties. Finally, the CO stated that the Employer's contention that the U.S. applicants cannot cook "Greek" dishes is undermined by the Alien's own limited experience in Greek cuisine. (AF 4; *See* AF 32).

Upon review, we find that although the resumes of U.S. applicants Rush and McKee indicate that they have extensive cooking experience, there is no suggestion that their background includes expertise in Greek cuisine. (AF 47, 48). However, the Employer provided little documentation to support its contention that it needs a Specialty Chef in Greek cuisine. The Employer's existing menu clearly indicates that it is essentially an American restaurant. The Employer's "documentation" is limited to its owner's mere assertion that it is seeking to expand its Greek clientele, together with a list of proposed Greek dishes and pastries, which purportedly would be added to the Employer's menu.

Moreover, the Specific Vocational Preparation ("SVP") level for a "Chef" or "Specialty Chef" position under D.O.T. 313.131-014 is "7," which represents an experience requirement of "over two years up to and including 4 years." Accordingly, the Employer's requirement of six years experience is unduly restrictive under section 656.21(b)(2)(i)(B). Furthermore, since the Alien apparently lacked such experience, the Employer did not comply with the provisions of section 656.21(b)(5). Consequently, we conclude that the CO properly denied the Employer's application for permanent labor

certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.